Attachment 3

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March 3, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Petition for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338; *In the Matter of SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235; *In the Matter of Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260

Dear Ms. Dortch:

This *ex parte* letter addresses arguments raised by Verizon, SBC, and Qwest in their reply comments in support of their respective petitions for forbearance in the above-captioned proceedings.[1] In these filings, the Bells attempt for the first time to answer AT&T's showing[2] that their forbearance petitions are categorically foreclosed by two separate provisions

[1] Reply Comments of Verizon, *Petition for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338 (Nov. 26, 2003) ("*Verizon Reply*"); Reply Comments of SBC Communications Inc., *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235 (Dec. 12, 2003) ("*SBC Reply*"); Reply Comments of Qwest Communications International Inc., *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260 (Jan. 30, 2004) ("*Qwest Reply*").

[2] Opposition of AT&T Corp., *Petition for Forbearance of the Verizon Telephone Companies*, CC

(continued . . .)

of the Communications Act and, in any event, do not satisfy the three specific requirements for forbearance contained in the Act. As explained below, the Bells' reply comments fail to come to grips with the fundamental flaws in their petitions identified by AT&T and other commenters.

I. SECTION 271(d)(4) AND SECTION 10(d) OF THE COMMUNICATIONS ACT EACH INDEPENDENTLY BAR THE REQUESTED FORBEARANCE RELIEF.

Section 271(d)(4). Section 271(d)(4) is an express "limitation on [the] Commission."[3] The statute provides that the Commission "may not," either by rule "or otherwise," "limit the terms used in the competitive checklist." That, of course, is precisely what the Bells seek in their forbearance petitions. The Bells advance three arguments to the contrary, but each is meritless.

First, the Bells contend that even if section 271(d)(4) limits other Commission authority, it does not limit the Commission's forbearance authority.[4] That argument is foreclosed by the plain text of section 271(d)(4), which is absolute and unqualified. The Commission is expressly precluded, "by rule or otherwise," from "limit[ing]" the terms of the competitive checklist. The Bells' forbearance petitions clearly ask the Commission to "limit" the competitive checklist within the plain meaning of that term[5] – if those petitions were granted, a Bell operating company ("BOC") would have no obligation to provide network elements that the section 271 checklist currently obligates them to provide. And section 271(d)(4) expressly prohibits the Commission from imposing such limits "by rule or otherwise" – Congress could not have more clearly commanded that the Commission may not limit the competitive checklist through *any* means or procedural device. There can be no serious argument that limitation by forbearance is not limitation "otherwise" than by rule.

Second, the Bells contend that the general section 10 limitation on the Commission's forbearance authority must be read to override the specific section 271(d)(4) competitive checklist prohibition, because section 10 authorizes the Commission to forbear from applying "*any* provision" of the Act and "also cross-references section 271 explicitly."[6] This

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Docket No. 01-338 (Nov. 17, 2003) ("*AT&T Verizon Opposition*"); Opposition of AT&T Corp., *SBC Communications Inc.'s Petition for Forbearance*, WC Docket No. 03-235 (Dec. 2, 2003) ("*AT&T SBC Opposition*"); Opposition of AT&T Corp., *Qwest Communications International Inc. Petition for Forbearance*, WC Docket No. 03-260 (Jan. 20, 2004) ("*AT&T Qwest Opposition*").

[3] 47 U.S.C. § 271(d)(4).

[4] *See, e.g.*, *Verizon Reply* at 16 (section 271(d)(4) speaks to "the Commission's default authority to interpret the Communications Act flexibly in the *absence* of forbearance") (emphasis in original).

[5] *See* Webster's Revised Unabridged Dictionary (to "limit" is to "*terminate*, circumscribe, or restrict") (emphasis added).

[6] *Verizon Reply* at 16-17 (emphasis in original); *see also SBC Reply* at 19; *Qwest Reply* at 3-4.

argument conflicts with the Supreme Court's express "warning against applying a general [statutory] provision when doing so would undermine limitations created by a more specific provision."[7] Under the Bells' interpretation, Section 10(d), which conditions the Commission's authority to forbear from enforcing any requirement of section 271, trumps the express limitation created by section 271(d)(4) on the Commission's power as it relates more specifically to the section 271 checklist. Moreover, the Bells' proposed construction would accord no coherent meaning to the phrase "or otherwise." In contrast, reading section 271(d)(4) as written both gives content to the "by rule or otherwise" command and preserves broad independent meaning for section 10(d), because section 271(d)(4) only applies to the section 271 *checklist*. Thus, the Commission can forbear from applying the many other section 271 requirements (such as section 271(d)(3)(A)'s requirement that the BOCs comply with section 272 in providing in-region long distance service) once the Commission can support the required "fully implemented" determination.

The Bells' argument fails for an additional reason. The section 10(d) "cross-reference" to section 271 upon which the Bells rely is not an independent grant of authority to the Commission, but an explicit "[l]imitation" that circumscribes the Commission's forbearance authority with respect to section 271.[8] It is simply absurd to suggest that one express limitation on the Commission's authority can be read to repeal another express limitation on the Commission's authority.

Third, the Bells argue that section 271(d)(4) "simply directs the Commission to ensure full implementation of the competitive checklist *before* granting an application under section 271," and that once an application has been granted and (in the Bells' view) the checklist requirements have been "fully implemented," the checklist requirements "are eligible for forbearance under section 10(a)."[9] This argument, too, is foreclosed by the plain text of section 271(d)(4), which contains no language whatsoever limiting its application to the period before a section 271 application is granted. The time limitation the Bells posit is made of whole cloth and could not be sustained on appeal.

In all events, the Bells' argument is contrary to the very structure of section 271 and the role the competitive checklist plays in ensuring that local markets remain open to competition. Congress recognized that once a BOC obtained long distance authority, there would be a serious risk of "backsliding." Thus, "obtaining section 271 authorization is *not* the end of the road" and Congress made clear that the requirements of section 271, including the section 271 checklist, endure long after the BOC receives section 271 authorization.[10]

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[7] *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996).

[8] 47 U.S.C. § 160(d).

[9] *SBC Reply* at 18-19 (emphasis in original); *Verizon Reply* at 16; *Qwest Reply* at 3 ("Section 271(d)(4) is aimed at ensuring full implementation of the section 271(c)(2)(B) competitive checklist *before, but not after*, a section 271 authorization has been granted") (emphasis in original).

[10] *See* Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization*
(continued . . .)

Thus, section 271(d)(6) imposes on the Commission an ongoing obligation to ensure that BOC local markets remain open to competition even after the BOC has satisfied the competitive checklist and obtained section 271 approval. Section 271(d)(6) empowers the Commission to act *sua sponte*, requires the Commission to act within 90 days on any complaint alleging a violation of section 271, and authorizes the Commission to suspend or revoke a BOC's section 271 authority. All of these post-authorization administrative remedies and enforcement powers could be rendered impotent if, as the BOCs contend, the Commission is free through forbearance to limit the terms of the competitive checklist after section 271 authorization has been granted. And, as explained below, the Commission has already rejected the Bells' position that the competitive checklist is fully implemented once a section 271 application is granted.[11]

Section 10(d). The Bells' petitions are also fatally premature. Section 10(d) states that "the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that *those requirements* have been fully implemented."[12] The Bells do not even attempt to argue that *all* of the requirements of section 251(c) and section 271 have been "fully implemented." Instead, they contend that the Commission can forbear from enforcing a particular requirement of section 271 based on a determination that that single requirement has been "fully implemented," without regard to whether the other requirements of section 271 and 251 have been "fully implemented."[13] In support of this piecemeal approach,

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Under Section 271 of the Communications Act to Provide In Region, InterLATA Service In the State of New York, 15 FCC Rcd. 3953 ¶¶ 448, 453 (1999) (stating that "obtaining section 271 authorization is *not* the end of the road" and that the "critically important power" in section 271(d)(6) "underscores Congress's concern that BOCs *continue to comply* with the statute") (emphasis added).

[11] The Bells also repeat their claim that section 706 of the Act serves as a "thumb on the deregulatory side of the balance" with respect to the forbearance analysis. *Verizon Reply* at 15-16; *SBC Reply* at 16-17. Specifically, in response to AT&T's analysis demonstrating that section 706 is irrelevant to the scope of a BOC's access obligations under section 271, the Bells argue that the relevant inquiry is only whether section 706 is relevant to section 10(a) forbearance analysis. *See AT&T Verizon Opposition* at 19; *AT&T SBC Opposition* at 23-24. The Bells misconstrue AT&T's argument. Whether or not section 706 may be a proper consideration under section 10(a) with respect to *some* forbearance requests, it cannot overcome the plain language and other barriers AT&T has identified that make clear that the Commission has no authority to forbear from enforcing provisions of the section 271 checklist. And the Commission has held that section 706 grants the Commission no "independent" source of authority. Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶ 176 (2003) ("*Triennial Review Order*").

[12] *See* 47 U.S.C. § 160(d) (emphasis added).

[13] *Verizon Reply* at 18-19 ("the 'fully implemented' language of section 10(d) applies on a granular basis to the specific requirements of section 271 from which a Bell company seeks forbearance"); *SBC Reply* at 19-20; *Qwest Reply* at 3.

the Bells contend that "those requirements" in section 10(d) refers to the provisions "from which the BOC is seeking forbearance."[14] This interpretation wholly ignores the subject of the sentence: "the requirements of section 251(c) or 271." "Those requirements" in the second part of the sentence clearly refers to the sentence's subject – the collective requirements of section 251(c) and 271. The Bells' contrary reading is contrary to the text and, therefore, untenable. If Congress had intended the Bells' interpretation it would have said: "the Commission may not forbear from *a* requirement of section 251(c) or 271 . . . until it determines that *that* requirement has been fully implemented.".

The Bells also wrongly contend that their statutory interpretation is supported by the *Verizon Forbearance Order*.[15] According to the Bells,[16] this order confirms their "granular" reading of section 10(d) because the Commission, in rejecting Verizon's petition for forbearance from requirements of section 271 that obligate a BOC to provide long distance services through a separate affiliate, observed that it was not necessary to address "whether any other part of section 271, such as the section 271(c) competitive checklist, is 'fully implemented.'"[17] The passage cited by the Bells in no way supports their position. The Commission's observation that it did not decide whether the section 271 checklist is "fully implemented" merely confirms the common sense, and undisputed, proposition that it did not need to reach the question of whether the checklist was "fully implemented" because there was not even "full implementation" of the very provision from which Verizon was seeking forbearance. Thus, the *Verizon Forbearance Order* did not address the issue presented here – *i.e.*, whether the Commission can exercise forbearance authority based on a determination that only the narrow section 271 requirement from which the Bell seeks forbearance has been "fully implemented."

In any event, the Bells' interpretation of section 10(d) is unreasonable (and therefore impermissible) because it would undermine the Act's purposes. The requirements of sections 271 and 251(c) – the provisions intended to *open* local markets to effective competition – work together as an integrated whole to ensure that local markets remain fully open to competition. Specifically, the section 271 checklist obligations are designed to establish a baseline requirement that core network facilities continue to be made available on nondiscriminatory terms until a BOC's substantial market power is sufficiently dissipated. It therefore would make no sense to grant the Commission authority to forbear from enforcing discrete requirements of section 271 (such as loop or switch unbundling requirements) merely upon a finding that *those* requirements have been fully implemented, while numerous other requirements have *not* been fully implemented. Section 10(d) was clearly designed to place the entire framework of local competition protections off-limits from the exercise of forbearance authority until all of the requirements of those interrelated provisions are fully implemented.

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[14] *Verizon Reply* at 18; *SBC Reply* at 20; *Qwest Reply* at 3.

[15] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149 (Nov. 4, 2003) ("*Verizon Forbearance Order*").

[16] *Verizon Reply* at 19; *SBC Reply* at 20; *Qwest Reply* at 2-3.

[17] *Verizon Forbearance Order* ¶ 6.

But even if the Bells are correct that they need merely to show "full implementation" of the individual section 271 checklist items from which they seek forbearance, they have not made that showing. The only "evidence" they offer of "full implementation" is their time-worn argument that their section 271 applications have been granted.[18] As a matter of law, this is patently insufficient.[19]

The Bells' argument rests on a fundamental misreading of the statute. Section 271(d)(3)(A)(i) requires a BOC to show the existence of a single interconnection agreement that has "fully implemented" the competitive checklist. That this is not equivalent to a finding that the "requirements [of section 251(c) or section 271] have been fully implemented" should be obvious. In this regard, the Bells are plainly wrong in claiming that AT&T seeks to ascribe different meanings to the "same" language in two provisions of the Act; the language at issue here is *not* the same. Section 10(d) asks whether the statutory provisions themselves ("the requirement of those sections") have been fully implemented; section 271(d)(3)(A)(i), in contrast, asks only whether "the petitioning BOC" has, at a particular point in time and with respect to particular interconnection agreements, fully implemented the checklist requirements *by including them in those state commission-approved and legally binding agreements.*

The Commission's section 271 precedents confirm that the Commission was not making any comprehensive determination that the requirements of section 251(c) and 271 were themselves "fully implemented" or, indeed, even that the BOC applicant had "fully implemented" the requirements of section 251(c) and section 271. Early on in evaluating section 271 applications, the Commission held that its review would be quite limited in important respects. First, the Commission held that it would not evaluate whether a BOC application had complied with rules that were promulgated, but not effective at the time of the application.[20] Thus, for example, the Commission did not evaluate whether SBC in Texas complied fully with all of the Commission's rules implementing Rule 319 because those rules went into effect shortly

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[18] *Verizon Reply* at 17-18; *SBC Reply* at 19-20; *Qwest Reply* at 1-2. The BOCs rely on the canon of statutory construction that identical words used in different parts of the same act generally are assumed to have the same meaning. But, as AT&T demonstrated, courts and the Commission have on numerous occasions decided that the same term used in multiple sections of the Communications Act should be interpreted differently when, as here, there are different purposes underlying the sections in which the term is used. *See AT&T Verizon Opposition* at 14-15; *AT&T SBC Opposition* at 16 (citing authorities).

[19] In a recent filing, a coalition of CLECs filed an *ex parte* letter regarding the showing required to demonstrate "full implementation" within the meaning of section 10(d) of the Communications Act. *See Ex Parte* Letter from Jonathan Askin *et al.*, to Marlene Dortch, FCC, at 2-5 (filed in WC Docket Nos. 03-260, 03-235, 03-220, 03-157, 03-189, and CC Docket No. 03-338, March 1, 2004). AT&T endorses that filing.

[20] Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354, ¶ 30 (2000).

after SBC filed its application, and the Commission undertook no assessment of whether SBC implemented OSS to accommodate line sharing.[21] Likewise, Verizon in New York was not required to show compliance with any aspect of the Commission's Rule 319 regulations.[22] In this regard, the Commission stressed that its rules "vary with time" and that the section 271 process would only work if the BOC's application were judged only against those rules that were "fix[ed]" at the time of the application.[23]

Second, the Commission observed that its existing rules do not address many local competition issues or are ambiguous in key respects, and thus held that it would only evaluate section 271 applications with respect to a BOC's compliance with "clear" rules or "self-executing requirements of the Act."[24] In so holding, the Commission observed that the "fast track" 90-day section 271 process was not an appropriate forum for addressing "fact-intensive" disputes about an individual BOC's compliance with the Act or resolving "industry-wide local competition questions."[25]

In all events, the Commission *rejected* the Bells' argument in the *Verizon Forbearance Order*.[26] Specifically, the Commission expressly rejected the notion that the grant of section 271 authority in a state means that all of the requirements of section 271, including the incorporated requirements of section 272, have been "fully implemented." Instead, the Commission held that "full implementation" must be determined on the basis of whether the "goals" of the underlying statutory provisions have been fulfilled.[27] The BOCs cannot possibly make that showing, and do not even attempt it.

Ultimately, the "fully implemented" requirement of section 10(d) must be interpreted in light of the purposes of section 271. Section 271 is intended to open local markets to competition *and* ensure no backsliding by the BOCs after section 271 relief is granted. That will be accomplished only when the Bells' incentives to backslide are eliminated, which will occur only when, at a minimum, there is ubiquitous availability of cost-based wholesale

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[21] *Id.* ¶¶ 32, 33.

[22] *Id.* ¶ 32.

[23] *Id* ¶ 27.

[24] *Id.* ¶ 23.

[25] *Id.* ¶ 25. *See also* Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. D/B/A Southwestern Bell Long Distance for Provision of In Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd. 6237, ¶ 19 (2001) ("Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular State at a particular time. Such fast-track, narrowly focused adjudications are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability").

[26] *AT&T Verizon Opposition* at 10-11; *AT&T SBC Opposition* at 13-15.

[27] *Verizon Forbearance Order* ¶ 7.

alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets. Section 271 (and section 251(c)) will be "fully implemented," therefore, when a practical effect results: namely, when ubiquitous and durable local competition *actually exists* and the incumbents no longer control bottleneck facilities. There can be no dispute that local competition remains nascent today. Accordingly, the "fully implemented" requirement is not satisfied, and the Commission is therefore barred from granting the BOCs' forbearance requests.

II. THE BELLS FAIL TO SATISFY THE THREE SECTION 10(a) CONDITIONS FOR FORBEARANCE OF "BROADBAND" OBLIGATIONS.

In any event, the Bells cannot meet the specific requirements for forbearance contained in section 10(a), with respect to access to "broadband" elements required by section 271.[28] Under § 10(a), the proponent of forbearance must make three "conjunctive" showings, and the Commission must "deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied."[29] First, the proponent of forbearance must show that enforcement of the specific regulations that apply to the "telecommunications service" at issue "is not necessary to ensure that the charges, practices, classifications, or regulations . . . in connection with that . . . telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory."[30] Second, it must show that enforcement of those regulations "is not necessary for the protection of consumers."[31] And, third, it must show that non-enforcement of those regulations "is consistent with the public interest," *id.* § 160(a)(3), and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."[32]

Here, the Bells are seeking forbearance from regulation that apply to the "telecommunications service" of providing certain unbundled network elements to competitive carriers. Thus, under section 10(a)(1), the Bells must demonstrate that the regulations from which they are seeking forbearance – *i.e.* those provisions of section 271 that require the Bells provide unbundled access to certain elements and regulate the price, terms and conditions of those wholesale services – are unnecessary to ensure just, reasonable, and nondiscriminatory terms and conditions for those services.

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[28] *AT&T Verizon Opposition* at 16-26; *AT&T SBC Opposition* at 20-30; *AT&T Qwest Opposition* at 3-4. AT&T also renews and preserves its argument that because the Bells are asking the Commission effectively to nullify Congress's intent, the forbearance that they request may be an unconstitutional delegation and the Presentment Clause of the Constitution. *See, e.g., AT&T SBC Opposition* at 35 n.25.

[29] *Cellular Telecommunications & Internet Assoc. v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) ("*CITA*").

[30] 47 U.S.C. § 160(a)(1).

[31] *Id.* § 160(a)(2).

[32] *Id.* § 160(b).

This showing is foreclosed by the *Triennial Review Order* and yesterday's decision in *United States Telecomm. Ass'n v. FCC* ("*USTA II*").[33] In *USTA II*, the D.C. Circuit agreed that the Commission's findings in the *Triennial Review Order* established that competitive carriers would be "impaired" without access to the full capabilities of hybrid fiber-copper loops.[34] Under the Commission's impairment test, impairment exists when natural monopoly and sunk cost entry barriers make it uneconomic for competitive carriers to deploy their own hybrid fiber-copper loops.[35]

In light of these findings, the regulations from which the Bells seek forbearance are clearly necessary to prevent the exercise of market power over the services at issue. The Bells have the ability to charge supracompetitive prices for wholesale access to their broadband loops – or deny access altogether – because it is economically infeasible for competitive carriers to self-deploy their own broadband loops. Nor could competitive carriers turn to alternative providers for such access. Cable facilities cannot be used by competitive carriers to offer voice and data services and, in all events, cable companies do not offer such wholesale access. To be sure, the D.C. Circuit upheld the Commission's elimination of hybrid fiber-copper loops (as well as all fiber loops) as an unbundled network element under section 251 on the grounds that the "at a minimum" language of section 251(d)(2) permitted the Commission to find that this impairment was outweighed by the benefits eliminating unbundled access to hybrid fiber-copper loops would have by "incenting" carriers to deploy their own packet-switched networks.[36] But no such balancing is permitted under section 10(a)(1). To the extent that forbearance would allow the Bells to exercise any market power over the leasing of access to their local networks, the Commission's precedent makes clear that it must be denied.[37]

For these same reasons, the Bells petitions do not satisfy section 10(a)(3). That provision requires the Commission to examine whether forbearance will "promote competitive market conditions" and "enhance competition among providers of telecommunications services." Granting the Bells an unregulated monopoly clearly does not "promote competitive market conditions" or "enhance competition among providers of telecommunications services."

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[33] No. 00-1012, slip op. (D.C. Cir. March 2, 2004).

[34] *Id.* at 35-36.

[35] *Triennial Review Order* ¶¶ 75-78.

[36] *USTA II* at 37-41.

[37] *See, e.g.*, First Report and Order, *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, 15 FCC Rcd 17414 ¶ 13 ("In determining whether to forbear from applying specific statutory or regulatory provisions, our goal, consistent with sound public policy and Congressional intent, is to deregulate whenever the operation of competitive market forces is capable of rendering regulation unnecessary. At the same time . . . the decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are not met").

The Bells also fail to satisfy section 10(a)(2). Here, the Bells fall back to their shop worn argument that broadband unbundling is unnecessary to promote the public interest and protect consumers because the Bells already face effective broadband competition.[38] But even if that were true – and as explained below, it is not – this argument does not answer AT&T's argument that continued unbundling of broadband loops is necessary to protect competition for consumers that increasingly demand *bundles* of voice and data services.[39] Absent the provisions of section 271 that the Bells seek to gut, the Bells would be the only carriers with the ability to offer ubiquitously to consumers the bundles of traditional voice and next-generation data services that they demand.

The Bells struggle to suggest that other carriers are capable of matching their voice-data bundles. For example, the Bells suggest that cable carriers can provide bundled services through the use of voice-over-IP ("VoIP") technology.[40] Notably, however, the Bells acknowledge that no cable company today is currently offering bundles of data service and VoIP.[41] And as to "third party" VoIP providers, these providers generally do not independently offer high speed data services because they do not own last mile facilities. VoIP is a *protocol* for transmitting information over facilities, and VoIP providers use the incumbents' local loops and transport facilities to originate and terminate calls. Vonage, the nation's largest provider of VoIP services, claims about 100,000 total lines – less than one-tenth of one percent of the mass-market total.[42] And while the Bells are correct that some cable companies offer cable telephony, this service is available to only a small percentage of customers and, as the Commission recently found, future expansion of the service is now in doubt.[43]

SBC also suggests that competitive local exchange carriers ("CLECs") have the ability to provide such packaged services through "[t]he availability of line splitting, together with the opportunity to enter into commercial line-sharing arrangements."[44] This is precisely AT&T's argument. If CLECs are to be able to offer such bundles of voice and data they need to be able to access the full broadband capabilities of loops. But the *Triennial Review Order* denied exactly such access with respect to all fiber loops and "hybrid" fiber-copper loops. Moreover, the Commission is phasing out line sharing.[45] Thus, absent the section 271 checklist requirements, the Bells would have no obligation to provide unbundled access to broadband

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[38] *Verizon Reply* at 10-11; *SBC Reply* at 13.

[39] *AT&T Verizon Opposition* at 23, 30; *AT&T SBC Opposition* at 27-28; *AT&T Qwest Opposition* at 4.

[40] *Verizon Reply* at 10-11; *SBC Reply* at 13-14 & n.33.

[41] *SBC Reply* at 13.

[42] *See, e.g.*, http://www.vonage.com/corporate/press_index.php?PR=2004_02_19_0.

[43] *Triennial Review Order* ¶ 229.

[44] *SBC Reply* at 13.

[45] *Triennial Review Order* ¶¶ 255-69.

capable fiber-based loops and CLECs would have no ability to offer the same voice-data bundles that the Bells can currently offer.

The Bells also fail to support their predicate claims about facing effective competition in broadband markets. The Bells engage in the usual histrionics that they are mere "second-tier players" and face effective competition from "dominant" cable companies.[46] But they offer no response to AT&T's showing that this claim, at best, proves the existence of duopoly competition that is patently insufficient to show that the BOCs lack market power in the provision of broadband services.[47] Duopoly "competition" is problematic not just because the firm with the larger market share may exercise market power, but because *both* participants are likely to have the incentive and ability to maintain prices above competitive levels rather than attempting to ruthlessly compete with the other, as they would need to do in a market with multiple firms.[48] Notably, in its *Mass Media Ownership Order*, the Commission held that "both economic theory and empirical studies" indicate that "five or more relatively equally sized firms" are necessary to achieve a "level of market performance comparable to a fragmented, structurally competitive market."[49]

The Bells also do not respond to AT&T's showing that even the duopoly premise is false in many important respects. "[T]he geographic scope of the market for broadband access is local,"[50] and, as Chairman Powell recently stated, "despite increasing access to broadband services, significant areas of the country still lack any type of broadband access or competition among broadband service providers."[51] Thus, in many areas the Bells' DSL offerings face no cable competition.[52] This is particularly true with respect to business customers. Cable is not

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[46] *Verizon Reply* at 9; *SBC Reply* at 13.

[47] *AT&T Verizon Opposition* at 21-22; *AT&T SBC Opposition* at 26.

[48] *See* United States Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines*, Section 2 (rev. Apr. 8, 1997).

[49] Report and Order, *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, ¶ 289 (2003).

[50] Reply Comments of BellSouth, Harris Dec. ¶ 6 (filed CC Docket No. 01-337 Apr. 22, 2002).

[51] Notice of Proposed Rulemaking, *Carrier Current Systems, including Broadband over Power Line Systems*, ET Docket No. 03-104, FCC 04-29 (Feb. 23, 2004) (Statement of Chairman Powell); *see also* Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 15 FCC Rcd. 20913, ¶ 1 (2000) (what is true "for any technology" in the early stages of development is particularly true for broadband: deployment "is not uniform across the nation").

[52] See Third Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 17 FCC Rcd. 2844, App. C, Table 9 (2002).

generally available in business districts at all; virtually all small business customers of cable are in suburban areas that contain or are immediately adjacent to residences.[53]

Unable to show that eliminating unbundling obligations promotes competition or protects consumers, the Bells mindlessly repeat their mantra that forbearance from the section 271 unbundling requirements is necessary to give them appropriate incentives to invest in broadband technology.[54] For the reasons explained above, this argument is irrelevant to any of the three section 10(a) factors. Even if eliminating the section 271 unbundling obligations could be believed to promote investment, the Bells must here satisfy *prove* that checklist unbundling is no longer necessary to ensure just reasonable and nondiscriminatory rates with respect to wholesale access to their loops or to protect consumers and competition.[55] As explained above, granting the Bells' petitions would affirmatively harm consumers and competition, enhancing the Bells' ability to charge supracompetitive rates. Under § 10, the Commission simply has no authority to trade off these harms in the hopes that eliminating unbundling will spur greater broadband deployment.

Further, as AT&T pointed out, this argument also has no force on its own terms because the Bells are now principally seeking forbearance from application of statutory requirements to unbundle hybrid copper-loop facilities – investments that they have *already* made or already have adequate incentives to make today.[56] Indeed, Verizon vividly confirms this point by candidly admitting that it is now "poised to begin deployment of fiber-to-the premises facilities in early 2004" and "has already signed agreements with equipment suppliers and contractors."[57] Plainly, the "extreme urgency"[58] that Verizon claims motivated its petition has nothing to do with its demonstrably sufficient incentives to continue to deploy hybrid-fiber-copper loop facilities, but has everything to do with its desire to block CLEC access to its broadband facilities.

Moreover, contrary to the Bells' assertions,[59] there could be no sustainable finding that the unbundling imposed by section 271 would have a material, negative impact on the Bells' investment incentives. The Commission expressly declined to require the Bells to provide section 271 checklist items at TELRIC-based rates, and instead mandated only that those elements, to the extent they are used to offer interstate service, be governed by the "just and reasonable" requirements of section 201 and the "nondiscrimination" requirement of section

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[53] *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC, at 2-5 (filed CC Docket No. 02-33, Feb. 4, 2003).

[54] *See Verizon Reply* at 9, 12-13; *SBC Reply* at 10-11,14

[55] *CTIA*, 330 F.3d at 509.

[56] *AT&T Verizon Opposition* at 25; *AT&T SBC Opposition* at 28.

[57] *Verizon Reply* at 1.

[58] *Id.*

[59] *SBC Reply* at 16.

202.[60] The BOCs have conceded that even "appropriate" TELRIC rates will provide Bells with sufficient incentive to invest in broadband facilities. Dr. Alfred Kahn, who testified on behalf of Verizon in the *Triennial Review Proceeding*, conceded that "TELRIC can be sufficiently flexible to accommodate investment risks in a way that is approximately correct economically."[61] *A fortiori*, to the extent that the Commission is merely subjecting the Bells to the potentially more flexible rate provisions of sections 201 and 202, there can be no legitimate concern about these obligations materially impairing the Bells' investment incentives.

In this regard, the Bells trip all over themselves trying to reconcile their current claims that section 271 unbundling deters investment with their prior statements to the Commission in the *Triennial Review* proceeding that they did *not* "intend[] to adopt a closed network model" but instead planned to provide CLECs wholesale access to fiber loops on a voluntary basis.[62] As AT&T explained,[63] these statements are logically contradictory. The rates, terms and conditions of the voluntary access that the Bells claimed they would provide and of section 271 access that they here seek to evade would be subject to the very same section 201/202 safeguards.

Verizon now says that section 271 unbundling would require "major alterations" of its network,[64] but never explains why this is the case or why similar "major alterations" would not be required for the wholesale fiber access it promised the Commission it would provide. SBC, on the other hand, says that while it is willing to enter into voluntary agreements, that is a "far cry from mandatory unbundling obligations."[65] This is empty rhetoric. Whether the access is provided "voluntarily" or as a direct result of the section 271 requirements, the rates, terms, and conditions of the access would be governed by sections 201 and 202. Thus, the purpose of these forbearance petitions must be to enable the Bells to deny wholesale access to fiber facilities altogether, even at the "just and reasonable" rates mandated by section 201. The very fact that the Bells are fighting so hard to deny altogether any obligation to provide CLECs access to broadband facilities – access that would be provided upon the same terms as "voluntary" access

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[60] *Triennial Review Order* ¶ 663.

[61] Reply Comments of Verizon, Kahn-Tardiff Reply Decl. ¶ 40 n.52, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (July 15, 2002 ("*Kahn-Tardiff Reply Dec.*") (*citing* Reply Brief for Petitioner FCC in *Verizon Communications v. FCC*).

[62] Comments of Verizon, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, at 82 (Apr. 5, 2002) (there can be "significant value in maintaining a wholesale business that allows other providers to reach their customers over our network"); *see also Triennial Review Order* ¶ 253 n.755 (relying on Verizon's promise to "make[] available wholesale broadband service offerings").

[63] *See, e.g., AT&T Verizon Opposition* at 21.

[64] *Verizon Reply* at 3.

[65] *SBC Reply* at 15.

– gives the lie to the Bells' claims that they are compelled by the "intensely competitive nature of the broadband market" to "create wholesale relationships" with CLECs.[66]

Finally, the Bells fall back to arguments that unbundling is "time consuming" and "expensive."[67] Again, this argument fails because so long as the Bells retain substantial market power either over the wholesale services that they offer to competitive carriers or at retail to consumers, complaints that it is "costly" for them to comply with the section 271 rules are patently insufficient under section 10 to justify the wholesale repeal of core nondiscrimination and unbundling requirements that they seek. Further, such bare *ipse dixit* about potential difficulties with unbundling future technology could not be a basis for the sweeping across-the-board relief that the Bells request now. In all events, the Bells' claims seem to be nothing more than an allusion to arguments that the Bells have presented in other *fora* and that have been thoroughly refuted.[68]

III. THE BELLS FAIL TO SATISFY THE THREE SECTION 10(a) CONDITIONS FOR FORBEARANCE OF "NARROWBAND" OBLIGATIONS.

The Bells also attempt a defense of their sweeping claim that a Commission finding of "non-impairment" *necessarily* requires that the Commission forbear from applying the corresponding section 271 checklist unbundling obligation,[69] but their effort is half-hearted. As AT&T explained, this argument is foreclosed by the plain language of the statute. The Commission has held that the unbundling obligations under section 271 are "independent" of the unbundling obligations imposed by section 251.[70] Reading the statute as the Bells propose would rob the section 271 checklist unbundling requirements of any independent force; in the Bells' view, the checklist unbundling obligations must terminate the very moment they would otherwise take effect.

In reply, the Bells claim that this is not the case because the checklist requirements "were intended to open the local markets in the event an application for section 271 relief preceded Commission unbundling rules."[71] Tellingly, SBC is unable to cite any support for this astonishing proposition. Nor could it. Congress directed the Commission to promulgate unbundling rules within six months and made compliance with those rules one of the conditions for long distance entry.[72] Further, as explained above, Congress made the section 271 checklist requirements an ongoing obligation to give the Commission a mechanism to prevent backsliding.

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[66] *Id.*

[67] *SBC Reply* at 14; *see also Qwest Reply* at 4-5; *Verizon Reply* at 12-13.

[68] *See Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC, CC Docket Nos. 02-33, *et al.* (Aug. 14, 2003).

[69] *See SBC Reply* at 10-18.

[70] *Triennial Review Order* ¶¶ 653-54.

[71] *SBC Reply* at 5.

[72] *See* 47 U.S.C. §§ 251(d)(1), 271(c)(2)(B)(ii).

More fundamentally, the Bells simply ignore the fundamental differences between incumbent local exchange carriers and BOCs and that the section 271 unbundling obligations are based on the unique historical status of the BOCs. The BOCs are the local exchange monopolies that were spun off from AT&T pursuant to the consent decree that settled the antitrust suit brought by the government. The "unique infrastructure controlled by the BOCs" is massive in scope and enables them to exercise extraordinary "monopoly power."[73] In addition, "[b]ecause the BOCs' facilities are generally less dispersed than [those of other competitors], they can exercise bottleneck control over both ends of a telephone call in a higher fraction of cases than can [other competitors]."[74]

As the Commission has noted, section 271 recognizes that "to permit the BOCs' immediate entry into the long distance market would allow the BOCs to leverage their bottleneck control in the local market into the long distance market and thus both threaten competition in the long distance market and entrench their monopoly in the local market."[75] Moreover, Congress recognized that competition would be unlikely to develop in the local exchange and exchange access markets "unless the BOCs had some affirmative incentive to open their local markets to competition."[76] Accordingly, "section 271(a) allows a BOC to enter the in-region, interLATA market, and thereby offer a comprehensive package of telecommunications services (*i.e.*, one-stop shopping for local and long distance service), only after it demonstrates, among other things, compliance with the . . . unbundling . . . obligations that are designed to facilitate competition in the local market."[77]

The Bells simply ignore that the section 271 unbundling obligations are designed to address the BOCs' undeniable market power derived from their unique control over the local telecommunications infrastructure in vast geographic areas. The section 271 unbundling obligations therefore serve distinct purposes from the section 251 unbundling obligations, and the Commission correctly recognized in the *Triennial Review Order* that the two sets of obligations are independent from each other.

Lastly, the Bells have no meaningful response to AT&T's argument that a finding of "non-impairment" does not, as the Bells claim, necessarily show that forbearance will protect consumers and competition.[78] They concede, as they must, that the Commission in the *Triennial*

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[73] *BellSouth Corp. v. FCC*, 162 F.3d 678, 689-90 (D.C. Cir. 1998); *see also* H.R. Rep. No. 104-204, pt. 1, at 49 (1995) (noting that the BOCs "provide over 80% of local telephone service in the United States").

[74] *BellSouth Corp. v. FCC*, 144 F.3d 58, 67 (D.C. Cir. 1998).

[75] Memorandum Opinion and Order, *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd. 21438, ¶ 5 (1998).

[76] *Id.*

[77] *Id.*

[78] The Bells continue to assert that "Commission precedent raises a substantial question whether elements that are not unbundled pursuant to section 251 are subject to the unbundling obligations in section 271 in the first place." *SBC Reply* at 8. Of course, the only Commission order to (continued . . .)

Review Order rejected an effective competition test for impairment, instead adopting a standard that is met where deployment by CLECs is merely *possible.*[79] Nonetheless, they claim that the Act rigidly mandates a "preference" for "facilities-based competition" and the Commission must forbear from any regulation that would discourage it, regardless of whether or not the regulation were necessary to protect competition or the public.[80] Even if the former were true, the latter contention does not follow it. Forbearance is only permitted when each of the three independent statutory criteria are satisfied. And even if promotion of "investment" is relevant to whether forbearance is in the "public interest" under section 10(a)(3), it would be patently unlawful for the Commission to forbear from a regulation on the basis that it would promote facilities "investment" where doing so would allow a BOC to charge unjust, unreasonable, or non-discriminatory rates, would allow the BOC to harm consumers with supracompetitive charges, or would undermine meaningful competition.[81]

Happily, the "tension" posited by the Bells between competition and investment is illusory. As the Supreme Court held in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 517 n.33 (2002), it is "commonsense" that "that so long as TELRIC brings about some competition, the incumbents will continue to have incentives to invest and to improve their services to hold on to their existing customer base." Further, as explained above, and as the Supreme Court held in *Verizon*, TELRIC includes forward-looking cost of capital and depreciation lives that are sufficient to compensate incumbent carriers for the risks they incur when investing in new facilities.

Finally, the Bells cannot rely on Commission findings of nonimpairment to satisfy their exacting burden of proof under section 10, because those Commission impairment rulings reflect determinations about *potential* market conditions, rather than *actual* market conditions. Further, the Commission expressly held that a finding of nonimpairment did not equate to a finding that an incumbent lacks market power.[82] Under section 10, on the other hand, findings

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address this issue is quite clear. The *Triennial Review Order* (¶¶ 653-55) expressly held that the obligations of section 251 and section 271 are independent. Further, the Bells simply ignore AT&T's showing, *AT&T SBC Opposition* at 31-32, that in each of the section 271 orders that SBC cites, the Commission separately analyzed whether the BOC had shown compliance with its section 251(c) unbundling obligation (as embodied in checklist time (ii)) and whether the BOC had shown compliance with its section 271 unbundling obligations (as reflected in checklist items iv-vi). The fact that the Commission found that the BOCs had satisfied their section 271 unbundling obligations based on evidence that they satisfied their analogous section 251 obligations merely shows that the substantive scope of the unbundling mandated by both statutes can be similar, not that elimination of section 251(c)(3) unbundling also eliminates section 271 unbundling.

[79] *SBC Reply* at 6.

[80] *Id.*

[81] 47 U.S.C. § 160(a), (b).

[82] *See also Triennial Review Order* ¶¶ 109-10 ("The purposes of a market power analysis are not (continued . . .)

about market conditions that may (or may not) exist at some unknown point in the future simply cannot provide a basis for immediate forbearance today – the Commission must find the absence of market power today. A request that seeks "the forbearance of dominant carrier regulation under Section 10" demands "a painstaking analysis of market conditions" supported by empirical evidence.[83] The Commission cannot, as the Bells would have it, simply "assume that, absent" the regulation at issue, "market conditions or any other factor will adequately ensure that charges . . . are just and reasonable and are not unjustly or unreasonably discriminatory."[84]

Sincerely,

/s/ David L. Lawson

David L. Lawson

(. . . continued)
the purposes of section 251(d)(2). . . . The Act requires only that network elements be unbundled if competing carriers are impaired without them, regardless of whether the incumbent LEC is exercising market power or the unbundling would eliminate this market power").

[83] *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp. v. FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001).

[84] Fifth Memorandum Opinion and Order, *1998 Biennial Regulatory Review – Review of ARMIS Reporting Requirements*, 14 FCC Rcd. 11443, ¶ 32 (1999).